

This report will be made public on 19 July 2023



Report No: **C/23/24**

To: Cabinet
Date: 27 July 2023
Status: Key Decision
Responsible officer: Andy Blaszkowicz – Director Housing & Operations
Cabinet Members: Councillor Jeremy Speakman – Cabinet Member for Assets & Operations

Subject: **Biggins Wood Development – Update on Remediation Contract and Site Disposal**

SUMMARY: The report provides an update to Members regarding the current position of the Biggins Wood site. Following the last Cabinet report in November 2021 (C/21/51) the report updates on the progress of the remediation contract and the sale of the commercial and housing land as previously agreed. The purchaser of the residential land has withdrawn their offer for the site. The commercial developer has made an offer for the whole site (i.e. both elements of commercial and residential land) and a further offer has been received by the council from a different organisation for the residential element of the site only.

REASONS FOR RECOMMENDATIONS:

The developer for the residential land has withdrawn their offer. The council has received: (a) an offer from the commercial developer for the whole site; and (b) a further offer from a housing association for the residential land only. These offers and the risk associated with them need to be considered by Members so that officers can proceed with the site disposal and satisfy the conditions of the Brownfield Land Release Fund (BLRF).

RECOMMENDATIONS:

1. To receive and note report C/23/24.
2. To note that [REDACTED] has withdrawn their offer for the residential land.
3. To note that the contract with [REDACTED] for the remediation of the site has concluded.
4. To agree that a Deed of Variation is executed with [REDACTED] to remove the construction of the access road and associated drainage connections from the contract and avoid any potential claims or further charges.
5. To agree that the unconditional offer from [REDACTED] for the whole site represents best value and poses the least risk to the Council, providing

delegated authority to the Director, Housing & Operations to finalise the legal work to conclude the disposal.

- 6. To provide delegated authority to the Director, Housing & Operations to conclude any further matters relating to the development and disposal within the agreed budget envelope.**

1 BACKGROUND

- 1.1 Members may recall that the Council purchased land at Biggins Wood on 21st December 2016. The price paid for the land was £1.5m. The land was purchased with existing planning permission for 77 homes, 54 light industrial units and one office building. The site comprises 4.43 hectares (10.95 acres) in all of which 1.6 hectares (3.95 acres) is the commercial land area and 2.3 hectares (5.68 acres) is the residential land area. The Access Road is 0.29 hectares (0.72 acres) and the ecological translocation area is a further 0.21 hectares (0.52 acres). The purchase cost was split with 70% being met by the General Fund and 30% from the Housing Revenue Account (HRA).
- 1.2 On 31 May 2017 Cabinet considered report C/17/06 and resolved:
1. *To receive and note report C/17/06.*
 2. *To note the necessary preliminary work required to undertake detailed delivery planning through to a procurement decision.*
 3. *To note that a further report is brought back to Cabinet when a delivery decision needs to be made. That report will:*
 - *Detail the issues around finance, risk profile and timelines of each option; and*
 - *to recommend a procurement route.*
- 1.3 On 20 February 2019 Cabinet received report C/18/70 on the outcome for grant funding made to Homes England under the Government's Accelerated Construction Programme to support remediation and other development costs for the site. The application was successful and the council was awarded approximately £1m. Cabinet resolved to accept the grant offered (minute 78) however, the grant was not drawn as the project was not able within the given timeframe to satisfy the associated contract requirements detailed in the grant offer.

2. REASONS FOR PURCHASING THE SITE

- 2.1 The report recommending the purchase of the site framed the reasons in the following way:-

"The reason for purchasing the site is to help meet the Council's vision.

Prosperous and ambitious – Working for more jobs and homes in an attractive district"

And in particular to implement proposals to meet the key objectives of the Council's Corporate Plan particularly:

- a) *To boost the local economy and increase job opportunities through the development of a major new employment offer;*

- b) *More homes; enable the construction of 77 new homes including 23 affordable homes;*
- c) *Support an attractive and vibrant place to live by ridding the area of a derelict and contaminated site and by creating new public open space.*
- d) *Deliver value for money..."*

2.2 It should be recalled that the last use of the site was in the late 1970s when the brickworks on it closed. It has remained unused therefore for approximately 40 years and without private sector interest. In the years of disuse, the site has become overgrown and is unattractive. The main access to it is particularly poor from an aesthetic point of view.

2.3 Whilst the Corporate Plan has been updated and refreshed the vision for the site remains unchanged; bring a brown field site back into use, creating new homes and creating more employment opportunities. Additionally the new Corporate Plan 2030 'Creating Tomorrow Together' adopted in February 2021(C/20/77) is built on four service ambitions, two of which are directly relevant to this project, A Vibrant Economy and Quality Homes and Infrastructure. The three year more detailed delivery plan (Corporate Action Plan) was adopted in October 2021 (C/21/40) and made specific reference to this project as did the Corporate Plan itself.

3. PLANNING PERMISSION AND S106

3.1 By way of reminder the planning permission is for a mixed use scheme consisting of:-

- 77 residential units, of which 30% (23 No.) will be affordable, and of those 60% (14 No.) will be for affordable rent and 40% (9 No.) will be shared ownership.
- 46 No. 2 bed 4 person houses.
- 31No, 3 bed 5 person houses.
- Commercial Office units – 660m².
- Light Industrial/Storage units – 5,142m².

3.2 The residential development land is linked to bringing forward the commercial development land through a S106 agreement. This is to ensure that the commercial development is brought forward before the housing development as previously the whole site was designated in the local plan for commercial uses.

3.3 The serviced plots for the employment units are to be brought forward with the following triggers linked to the occupation of the residential dwellings:-

- Serviced plots for employment units 1 to 18 to be constructed before the occupation of the 25th dwelling;
- Serviced plots for employment units 19 to 36 to be constructed before the occupation of the 50th dwelling;

- Serviced plots for the remaining employment units to be constructed before the occupation of the 77th dwelling.

The s106 describes “serviced plots” to mean the construction/preparation of the plots upon which the employment units are to be situated including any reasonably required access roads, landscaping and the provision of suitable connection points to utilities including drainage, water, electricity and broadband.

- 3.4 The S106 written as it is, adds a layer of complexity and risk as separate developers bringing forward parts of the site must work together, and the residential developer is dependent on the commercial developer delivering the serviced commercial plots. However, members are reminded that the S106 was intentionally designed to ensure that the employment land would be developed out in a timely manner in this mixed use scheme.

4. BROWNFIELD LAND RELEASE FUND

- 4.1 In 2021 The Department for Levelling Up, Homes and Communities (formally MHCLG) released the Brownfield Land Release Fund (BLRF) through One Public Estate. Officers submitted a bid for £1.15m. The Council was notified in September 2021 that it had been successful with a formal announcement being made in October 2021. This funding has contributed to the remediation of the site.
- 4.2 There are a number of conditions related to the grant award, the most notable being that the council has to be in an unconditional contract for the sale of the land to release the housing by March 2024.

5. ECOLOGY, REMEDIATION & SERVICES CONTRACT

- 5.1 The contract for the remediation of the land and construction of the entrance road and associated drainage connection works was awarded 4th August 2022 following a tender exercise.
- 5.2 The ecology and remediation work has been completed and the development platform prepared. These works have been completed within the contract sum and within the approved budget.
- 5.3 Officers worked closely with the contractors throughout this phase of the project. Whilst the remediation part of the contract has been delivered it became apparent that the delivery of the road and associated drainage works would not be possible at this point in time due to the detailed information that Southern Water required around finished floor levels and detailed drainage flow rates. Without this information, that would only be available after the residential and commercial developers had completed their detailed design work the contractor would not be able to enter into the required S104/S106 agreements with Southern Water in order to have an adoptable drainage network. Further to this, Kent County Council would be unable to adopt the road if the drainage within the road was not adopted by Southern Water. The adoption of the drainage connection is also linked to the occupation of the 50th dwelling.

- 5.4 The Council worked with the Contractor to find a solution to this but the information required was not available and the contractor would have suffered serious time delays which would have led to potential claims under the terms of the contract.
- 5.5 Following discussion with the Leader and relevant portfolio holder, it was agreed to remove the road and associated drainage works from the remediation contract and reduce the contract sum by the corresponding amounts.
- 5.6 A Deed of Variation (DoV) has now been drafted to vary the contract, and this report seeks authorisation to execute this deed. Practical completion certificates can then be issued to the contractor avoiding any potential legal claims and further costs. This is an urgent matter for conclusion.

6. SITE DISPOSALS – AGREED POSITION NOVEMBER 2021

- 6.1 **RESIDENTIAL LAND:** [REDACTED] agreed to purchase the residential side of the site and legal work has progressed for the freehold disposal. The Council will enter into a conditional contract to deliver a serviced, remediated site. The value of the freehold sale is [REDACTED].
- 6.2 **COMMERCIAL LAND:** [REDACTED] agreed to purchase the commercial side of the site and legal work has progressed for the freehold disposal. The Council will enter into a conditional contract to deliver a serviced, remediated site. The value of the freehold sale is [REDACTED].
- 6.3 Following extensive discussions with [REDACTED], they have agreed to take on the construction of the road and associated drainage works for a reduction in the sales price of the commercial land which directly correlates with the reduction in the remediation contract resulting from the Deed of Variation so the position is cost neutral to the council. This will allow the project to proceed without delay.

7. CURRENT POSITION – SITE DISPOSALS

- 7.1 [REDACTED] have withdrawn their offer for the purchase of the residential land citing commercial reasons.
- 7.2 [REDACTED] have said that they will step in and buy the residential land as well as the commercial land. They made an initial offer of [REDACTED] for the residential land which, after negotiation with officers, was subsequently raised to [REDACTED]. This is an increase of [REDACTED] over the previous [REDACTED] offer.
- 7.3 [REDACTED] will deliver a policy compliant scheme (30% affordable) which may increase, depending on scheme viability.
- 7.4 Their total offer for the site (prior to deductions for the delivery of the road and drainage works) is [REDACTED]. The offer is unconditional.

- 7.5 They are committed to bringing the whole site forward without the complication of separate developers on each side of the site which is linked through the conditions set out in the S106.
- 7.6 They have committed to completing the legal work quickly – exchange of contracts should be within 4 weeks and completion within 12 weeks.
- 7.7 This will satisfy the terms of the BLRF funding and avoid any risk to the council of having to pay back £1.15M if the transactions are not completed by March 2024.
- 7.8 As stated in paragraph 6.3 they will deliver the road and associated drainage works within the tendered cost envelope of the remediation contract.
- 7.9 They have stated that they are now only interested in the whole site and will pull out of the commercial land acquisition if the council decide to sell the residential land to another developer.

8. VALUATION ADVICE

- 8.1 Officers have sought valuation advice from Motis Estates who have extensive knowledge of the local commercial and residential markets.
- 8.2 **Commercial Valuation:** The advice provided suggests a market value range of £325K - £350K per acre. The developable commercial land is 3.9 acres therefore the expected sales return would be in the range of £1.27M - £1.36M.
- 8.3 The offer from [REDACTED] represents a cost per acre of [REDACTED] with a total site price of [REDACTED] which is substantially higher than the current market range.
- 8.4 **Residential Valuation:** The advice provided suggests a market value range of £400K - £450K per acre. The developable residential land is 5.68 acres therefore the expected sales return would be in the range of £2.27M - £2.56M.
- 8.5 The offer from [REDACTED] represents a cost per acre of [REDACTED] with a total site price of [REDACTED] which is higher than the current market range.
- 8.6 The (confidential) valuation report is attached in Appendix 1.

9. FURTHER OFFER RECEIVED

- 9.1 A further offer for just the residential land has been received from [REDACTED] who are a Housing Association.
- 9.2 The offer is for [REDACTED] equating to [REDACTED] per acre which is significantly higher than the valuation advice received.

9.3 [REDACTED] have stated that they will bring the scheme forward with a changed mix of housing - 57 units for shared ownership and 20 units for affordable rent.

9.4 This offer is subject to the following conditions:

1. Freehold purchase
2. Their offer assumes there is no VAT on the land, and they have asked to be advised if there is a VAT election
3. Satisfactory independent RICS valuation
4. [REDACTED] Board approval
5. Satisfactory planning permission without onerous conditions
6. Satisfactory S106 agreement
7. Satisfactory full geo-technical report and full review of technical due diligence
8. Their offer assumes a revision to the S106 Agreement to remove the link between the delivery of the commercial and occupation of the residential units.

9.5 [REDACTED] have confirmed that they would be able to deliver the road and associated drainage works although at this time the cost is unknown and could be outside of the cost envelope from the tender returns. This potentially represents an unquantified financial risk to the council.

10. FINANCE

10.1 The tables below show a breakdown of the site sales and grant income and show the high-level costs and projected surplus. For ease of comparison the cost of the road and drainage works has been left in the costs section as opposed to deducting the works from the sales income. At this stage it is assumed that [REDACTED] can deliver the road and drainage works within the tendered cost envelope. It is also assumed that with the [REDACTED] offer the council is able to secure another buyer for the commercial land and that offer is at the top of the valuation range.

10.2 [REDACTED] - Financial breakdown:

| Funding Source / Cost | Funding Source / Income | Expenditure |
|---|-------------------------|-------------|
| Residential Disposal | [REDACTED] | |
| Commercial Disposal | [REDACTED] | |
| BLRF | £1,150,000 | |
| Cost of land acquisition | | £1,500,000 |
| Estimated cost of remediation and servicing | | [REDACTED] |
| TOTAL | [REDACTED] | [REDACTED] |
| SURPLUS | [REDACTED] | |

10.3 [REDACTED] – Estimated Financial breakdown:

| Funding Source / Cost | Funding Source / Income | Expenditure |
|--|-------------------------|-------------|
| Residential Disposal | ██████████ | |
| Commercial Disposal (Estimated top of valuation range - Could be lower) | ██████████ | |
| BLRF | £1,150,000 | |
| Cost of land acquisition | | £1,500,000 |
| Estimated cost of remediation and servicing | | ██████████ |
| TOTAL | ██████████ | ██████████ |
| ESTIMATED SURPLUS | ██████████ | |

11. RISK / BENEFIT ANALYSIS OF RESIDENTIAL OFFERS

11.1 ██████████

- This is the lowest risk option to the council. The whole site is disposed of in one transaction within the available timeframe to satisfy the BLRF.
- This will be an unconditional contract.
- Legal work is already progressing on commercial side, amending this to the purchase of whole site is straightforward.
- Aware of all planning conditions and have been working through these.
- Not affected by S106.
- Have priced road and drainage works and can deliver within tendered cost envelope.
- Can finalise Deed of Variation with remediation contractor avoiding any legal claims to the council.
- Will bring forward policy compliant scheme (30% affordable).
- Exchange contracts in 4 weeks and complete within 12 weeks.
- Capital receipt received on completion ██████████.
- No risk to BLRF grant.
- Site is disposed of requiring no further action from the council.
- Council's original objectives for purchasing the site are achieved.

11.2 ██████████

- Substantially higher receipt for the residential land, but this is a significantly higher risk option for the council with multiple unknowns.
- 100% affordable scheme – 20 units affordable rent / 57 units shared ownership.
- Multiple conditions on contract which need to be worked through.
- ██████████ pull out of commercial land sale and the council must remarket the commercial element of the site.

- [REDACTED] require the conditions set out in the S106 linking the residential land to the development of the commercial land to be removed. This creates risk for the council in bringing forward the commercial land assuming the council can secure another buyer.
- Valuation advice suggests that the commercial market is good but they would expect 3-6 months for the marketing period followed by 3-6 months to complete legal work and due diligence.
- Site maintenance would be required by the council during this period – additional budget pressures would be felt.
- [REDACTED] offer for commercial land is higher than current market valuation. This may not be matched by a remarketing exercise.
- Unknown cost for delivery of road and associated infrastructure.
- Cannot finalise Deed of Variation with remediation contractor, exposing the council to legal claims and financial penalties under the contract.
- Offer subject to [REDACTED] Board approval.
- [REDACTED] have not completed due diligence on the site, the wider planning conditions and the remediation works undertaken.
- No set date for exchange and completion.
- Potential risk to BLRF grant – potential payback £1.15M by the council.

12. CONCLUSION

- 12.1 Whilst the potential capital receipt from [REDACTED] for the residential land is significantly higher than the offer from [REDACTED] it poses several significant risks for the council worthy of contemplation.
- 12.2 The offer from [REDACTED] is heavily conditioned including the variation of the s106 linking the residential land to the commercial land, this would need to be agreed at planning committee. The offer is also subject to a full RICS valuation and their Board approval. See legal comments below in section 15 of the report.
- 12.3 If the council accepts the offer from [REDACTED] then [REDACTED] have indicated they will pull out of the commercial land. The council would have to re-market the commercial land and may receive a lower value, or a higher value.
- 12.4 The DoV needs to be executed with [REDACTED] to remove the road and drainage works from the remediation contract. If this is not done the practical completion certificate cannot be issued and the council may face a contractual claim and financial penalties under the contract.
- 12.5 [REDACTED] have agreed to build the road within the current tendered budget envelope with this amount to be deducted from the sales price of the commercial land. The corresponding amount has been deducted from the [REDACTED] contract so this is cost neutral to the council. Concluding the land sales with [REDACTED] means that the DoV can be executed. Whilst [REDACTED] have confirmed they *could* build the road this element has not been priced and will take time to agree meaning that the DoV with [REDACTED] cannot be executed at this time.

12.6 The offer for the whole site from [REDACTED] is unconditional.

12.7 It is recommended that Members agree to sell the whole site on an unconditional basis to [REDACTED]. Their offer exceeds the independent market valuation that the council has received and brings forward the commercial and residential land. [REDACTED] have agreed to build the road and drainage infrastructure within the tendered cost envelope. This offer poses the least risk to the council, allows the council to execute the DoV with [REDACTED], and satisfies the terms of the Brownfield Land Release Fund grant. The council's original objectives for purchasing the site would be achieved; new homes and employment opportunities would be provided.

13. AGREEMENTS NECESSARY

13.1 Cabinet are asked to approve the recommendations set out in this report.

13.2 To achieve the Council's objectives, in respect of both the residential and commercial parts of the Biggins Wood Development, detailed contractual agreements are necessary.

13.3 It is suggested that the Director, Housing & Operations be authorised with the agreement of the Leader of the Council and the Cabinet Member, Assets and Operations, and in consultation with the Director for Corporate Services, to negotiate and conclude such agreements including the disposal contracts and to take such other actions as are necessary to deliver the Biggins Wood development in accordance with the recommendations set out in this report.

14. RISK MANAGEMENT ISSUES

14.1 Risks are set out in section 11 of the report.

15. LEGAL/FINANCIAL AND OTHER CONTROLS/POLICY MATTERS

15.1 Legal Implications: (NM)

s123 of the Local Government Act 1972 provides that a council may not dispose of land "for a consideration less than the best that can reasonably be obtained" except with the consent of the Secretary of State. The Council needs to be able to demonstrate that it has achieved best consideration by marketing the property and obtaining an appropriate independent valuation which it has done in this case. This does not mean that the Council necessarily has to proceed with the highest offer and is entitled to prefer a firm bid at a lower price. The offer from [REDACTED] is not a firm offer as it has various conditions attached to it and so is not without risk, that risk may in turn have financial as well legal / reputational implications. The report sets out the risk and benefits of accepting the offers from each party but I set out some of the conditions imposed by [REDACTED] with some comments:-

1. The offer is conditional on a satisfactory independent RICS valuation – therefore [REDACTED] may decrease their offer.

2. Satisfactory planning permission without onerous conditions – the site already has planning permission so it is unclear what is meant by this. Similarly satisfactory s106 agreement.
3. Variation to the existing s106 agreement to remove the link between the delivery of the commercial and the occupation of the residential units. This could be fairly problematic and carries with it potential reputational risks. Having spoken to the Chief Planning Officer regarding the likelihood of the existing s106 agreement being varied I set out the following:-
 - (a) A formal application would need to be made to request the variation. This is a fundamental change to the s106 agreement and the variation would need to be made public and should go before the planning committee for decision.
 - (b) The application would need to demonstrate that such a variation is justified by the applicants. It is assumed that the applicant would need to be the council so care would need to be taken regarding reputational damage to the council given that the council is the landowner and the LPA. The process and decision need to be transparent and justified.
 - (c) There is no guarantee as to the outcome. The planning permission granted the residential element to enable the employment units to come forward. The s106 agreement was specifically drafted to include appropriate phasing and the provision of triggers to ensure that an element of employment land was developed in relation to the residential and to prevent the employment section (being the least financially attractive part of the scheme) from being set aside and not commenced. The proposed variation would be contrary to this and may not be accepted by planning.
4. Dealing with the conditions of the offer will incur a delay to the sale of the residential land, particularly as it may take some time for the process outlined above to vary the s106 to be carried out. If the s106 agreement is varied, there is no guarantee that the employment land would ever come forward and the opportunity to sell it may be missed or it could end up being sold at a lower price than is currently being offered.

15.2 Financial Implications: (JS)

The financial implications are predominantly dealt with in the main body of this report (see section 10 – Finance). Both of the disposal options summarised at paragraphs 10.2-10.3 will provide a capital receipt (and surplus) to the Council.

It is however noted that whilst the receipt for [REDACTED] would be provisionally lower than that of [REDACTED], the [REDACTED] offer has conditions attached which are discussed in detail in the legal comments section above and that may lower the surplus summarised at paragraph 10.3. One of the [REDACTED] offer conditions relates to the VAT election at the site (see paragraph 9.4, term 2); the Council has made a VAT election on the site and this may therefore impact the quantum of their offer. There is therefore lower risk to the authority from a financial perspective with the offer from [REDACTED].

Separately, it should be noted that should the site be disposed of to either party, the HRA's 30% share of the land acquisition cost for the site (i.e. approx. £450k) will need to be repaid to the HRA.

15.3 Diversities and equalities implications: (AB)

There are no diversity or equalities issues arising from this report.

15.4 Environmental Implications: (AT)

There are no environmental implications arising directly from this report, which discusses offers for the sale of the site. The redevelopment has the potential for a positive impact on emissions from travel, as it makes use of a brownfield, urban site. Emissions from the construction and the operation of the buildings would be determined by the detailed design but would need to meet local plan policies and Building Regulations. The redevelopment has had a positive impact on pollution, in remediating a derelict brickworks site. The redevelopment would have the potential for a positive impact on biodiversity, following local plan policies for biodiversity net gain, but the extent of the impact will be dependent on the detailed design of the scheme.

16. CONTACT OFFICERS AND BACKGROUND DOCUMENTS

Councillors with any questions arising out of this report should contact the following officers prior to the meeting:

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The following background documents have been relied upon in the preparation of this report: None.

Appendices:

Appendix 1: (confidential) Valuation for Bigginswood